Nos. 11051 and 11059.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Appellant,

vs.

UNITED STATES OF AMERICA, and H. F. METCALF, Trustee in Bankruptcy for the Estate of F. P. NEWPORT CORPORATION, LTD., a corporation, bankrupt,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellees.

Upon Appeals from the District Court of the United States for the Southern District of California.

Brief of H. F. Metcalf as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd.

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TABLE OF AUTHORITIES CITED.

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Brief of H. F. Metcalf as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd.

Opening Statement.

As stated in the brief filed for the United States, the appeal of Security-First National Bank of Los Angeles, a

national banking association in case No. 11051 and the appeal of the United States in case No. 11059 were by order of Court consolidated.

By stipulation entered into between the parties, it was agreed (a) that the record in case No. 11051 might be considered as a supplement to the record in case No. 11059 for the purpose of appeal of the United States in the latter case, (b) that the United States would file but one brief, (c) that the brief filed by the United States would be considered an answering brief in case No. 11051 and an opening brief in action No. 11059, and (d) that the appellee H. F. Metcalf, as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., would have the usual time to file an answering brief insofar as the appeal in case No. 11059 was concerned. This brief is filed by said Trustee in Bankruptcy only for the purpose of answering the brief filed by the United States in case No. 11059. The said Trustee in Bankruptcy is taking no part in the appeal presented by Security-First National Bank of Los Angeles in case No. 11051.

The question of jurisdiction is covered by the Government in its brief so that there would be no purpose in our referring thereto in this brief. The only question that is presented in case No. 11059 is WHETHER OR NOT THE DISTRICT COURT ERRED IN DIRECTING THAT PAYMENT OF AN INSTALLMENT OF INTEREST IN THE SUM OF $5,534.11 BE MADE TO SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

Statement of Facts in Case No. 11059.

The United States does not challenge the Findings of Fact made by the District Court [found on pp. 22-31, incl., in the Record in case No. 11059], but merely challenges the direction or Order of the Court based on those Findings.

The facts as disclosed by the Findings may be briefly summarized for the purpose of this appeal as follows: Prior to adjudication in bankruptcy of F. P. Newport Corporation, Ltd., proceedings had been instituted by Security-First National Bank of Los Angeles for foreclosing its trust and selling the properties pursuant thereto, in order to liquidate an indebtedness owing to said Bank in excess of $1,350,000; the properties covered by the trust constituted in excess of 90% of the assets of the bankrupt estate; an involuntary proceeding in bankruptcy was instituted; the said Bank was restrained from proceeding with said foreclosure; H. F. Metcalf was appointed Receiver; after considerable negotiations an agreement was entered into between the Receiver, the alleged Bankrupt, and the said Bank providing for liquidation of the properties covered by the said trust and payment of the indebtedness owing to said Bank; on execution of said agreement the corporation was adjudicated a bankrupt; among other things, the said agreement provided for payment by the Trustee in Bankruptcy of interest on unpaid principal of the indebtedeness owing to said Bank at the rate of 4% per annum (rather than 7% per annum, the original trust rate), and the said agreement, as supple-

mented and modified, was approved by the Referee in Bankruptcy, the District Court, and this Court. (*In re F. P. Newport Corporation, Ltd.*, 98 Fed. (2d) 453.) Pursuant to said Order, the Trustee in Bankruptcy executed said agreement as so supplemented and modified. [R. 23-24.]

The Supplemental Agreement provided, among other things, in reference to payment of interest, as follows:

> "It is agreed that interest on said principal sum of $1,270,451.12, as provided in said agreement, up to August 1, 1937, together with the sum of $9,120.06 advanced for taxes on April 16, 1937, with interest thereon at 4% per annum from the date of such advance, to August 1, 1937, shall be added to the said sum of $1,270,451.12, and thereafter bear the same interest as said sum. It is agreed that the said sum, augmented by said above mentioned amounts, is as of August 1, 1937, the sum of $1,304,918.77. Said sum shall bear interest at the rate of 4% per annum from August 1, 1937, payable as follows:
>
> *Interest Payment Extended*
>
> The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal." [R. 119, Case No. 11051.]

Subsequent to the making of the agreement and approval thereof by the Court, an oil and gas lease was entered into between the said Bank, Trustee in Bankruptcy, and Bankrupt, as Lessors, and Universal Consolidated Oil Company, as Lessee, pursuant to which certain prop-

erties of the Bankrupt (title to which was held by said Bank as security as previously stated) were leased to said Lessee for production of oil and gas; thereafter oil and gas were discovered on said premises, and royalties have been paid on account thereof to the Trustee in Bankruptcy [R. 26-27]; and the said royalties as received were deposited by said Trustee in Bankruptcy in a special oil account carried in his name at the head office of said Bank.

From time to time thereafter but prior to the filing of the petition and order to show cause concerning payment of this particular installment of interest, said Trustee in Bankruptcy paid, out of said special oil account, interest to said Bank as it matured. [R. 29.] On June 6, 1944, the Referee made an Order that income taxes for the years 1938 and 1939 amounting to $19,363.65 should be paid by said Trustee in Bankruptcy from said special oil account. [R. 194-211, Case No. 11051.] Therefore, the Trustee in Bankruptcy being uncertain as to whether or not an interest installment of $5,534.11 due and payable on September 7, 1944, should be paid out of said special oil account during the pendency of the appeal prosecuted by the said Bank from the said Order directing payment of said income taxes (the correctness of which Order is involved in appeal of case No. 11051), filed a petition for instructions. Upon hearing of said petition, an Order was made directing said Trustee in Bankruptcy to pay said interest out of said special oil account; and, upon a review, the said Order was affirmed by the District Court and is the Order appealed from by the United States. [R. 22-23.] (References are to the Record in case No. 11059 unless otherwise noted.)

ARGUMENT.

It is obvious that there is no merit to the contention of United States that the interest due and owing to said Security-First National Bank of Los Angeles could be paid only if it were proper to make principal payments on account of the indebtedness owing to said Bank. It appears from an examination of the agreement of January 12, 1937, as supplemented and modified, that payment of interest to Security-First National Bank of Los Angeles was to be made by the Trustee in Bankruptcy during the period of administration. Payment of interest to the Bank was to be made currently as it matured, in quarterly installments, and was part of the consideration moving to said Bank for executing the said agreement and waiving its right to immediately foreclose under the terms of its trust, thus permitting liquidation of the properties in accordance with the said agreement over a period of years.

This Court has held that the Trustee in Bankruptcy herein was operating the business or properties of the said Bankrupt. (See *Metcalf, etc. v. United States of America,* 131 Fed. (2d) 677.) Part of the expense incident to such operation or the continued right of said Trustee in Bankruptcy to maintain, occupy and use these properties was payment of the current interest owing to said Bank. Consequently, it was like any other expense incurred by said Trustee in Bankruptcy and was payable as an expense of administration. The Bank expressly provided that oil funds could be used for payment thereof. And, in approving the said agreement of January 12, 1937, as supplemented and modified, the Court authorized payment thereof out of oil moneys.

Generally, all current expenses incurred by a Trustee in Bankruptcy during course of administration such as local

taxes on the land used by him as such Trustee in Bankruptcy, wages of employees of such Trustee in Bankruptcy, public utility charges, rent and all other charges incident to the maintenance or operation of the property conducted by such Trustee in Bankruptcy are expenses of administration within the meaning of the Bankruptcy Act. (See: *North Umberland Co. v. Philadelphia & Reading R. R. Co.,* 131 Fed. (2d) 563; *Lockhart v. Garden City Bank & Trust Co.,* 116 Fed. (2d) 658; *In re Pattee,* 143 Fed. 994; *In re Burbank Corporation,* 48 Fed. (Supp.) 172; *Wilson v. Pennsylvania Trust Co.,* 114 Fed. 742.)

If this Court should determine in connection with the appeal in case No. 11051 that the right of Security-First National Bank of Los Angeles to the oil funds was paramount to that of United States, it is obvious that United States could have no objection to payment of this interest out of those funds, since the Bank has consented thereto. The only question, therefore, to be determined is WHETHER OR NOT UNDER THE CIRCUMSTANCES AS DISCLOSED BY THE RECORD, THE UNITED STATES IS PREJUDICED IN ANY MANNER BY THE ORDER DIRECTING PAYMENT OF THIS INSTALLMENT OF INTEREST TO SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

At the time of the hearing of this matter there was owing to United States on account of income taxes only the tax for the years 1938 and 1939, to-wit, $19,363.65, together with interest thereon, which made a total of approximately $25,000. In addition, there were filed but not allowed, claims on account of alleged 1940, 1941 and 1942 taxes amounting to approximately $40,000. [R. 30.] Thus, in round figures, the total tax liability, assuming without in any way conceding that the Trustee in Bank-

ruptcy would be liable for claimed taxes of 1940, 1941 and 1942, would be $65,000.

The United States contends that said income taxes are payable as an expense of administration. Assuming this contention to be correct, it is equally clear that such taxes are entitled to no priority in payment over other expenses of administration such as interest currently owing to the Bank.

At the time of the hearing before the District Court of the petition to review the Referee's order directing payment of such interest, there was on deposit in said special account [R. 31] $56,000.00. Oil and gas royalties were being received at the rate of between $4,000 and $5,000 per month. [R. 31.] Findings were signed on April 9, 1945. [R. 33.] If $4,000 was received for each of the months of April, May, June, July, August, September and October, there would have been received by said Trustee in Bankruptcy $28,000.00, which added to the $56,000.00, would make a total of $84,000.00 in the special oil account. While it does not appear in the record, there was actually on deposit in said special oil account as of October 25, 1945, the sum of $86,122.52. So that, if we assume the tax liability is $65,000, it is obvious that there is plenty of money in said special oil account to pay all such tax liability which this Court might ultimately determine is payable out of said special oil account and the said interest installment of $5,534.11. By its Conclusion IV, the Court determined as follows:

> "That the payment of said interest to said Bank will not jeopardize or prejudice the United States, as there is on deposit in said Special Account more than sufficient funds to pay said interest and the allowed claims of the United States." [R. 32.]

We think it is unnecessary to prolong discussion of this matter, since it is obvious that the Court's determination was fully supported by the facts, and the United States would not be hurt or injured in any wise by payment of such installment of interest to said Bank.

Respectfully submitted,

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